(2)
Supreme Court U.S.
FILED
JAN 2 2003
OFFICE OF THE CLERK

No. 02-648

IN THE

Supreme Court of the United States

FREDERICK B. CAMPBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

FREDERICK B. CAMPBELL
555 Fifth Avenue
Suite 1700
New York, New York 10017
(212) 378-1720

6 pp

In the

Supreme Court of the United States

No. 02-648

Frederick B. Campbell, *Petitioner*,

-v.-

United States of America, *Respondent*.

ON PETITION FOR WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this reply brief in response to the "Brief for the United States in Opposition" ("Gov. Br.").

ARGUMENT

It is now widely recognized that state and local governments are facing severe fiscal crises. In 2003, many will have no choice but to reduce police and fire protection, education, and other public services, or significantly increase state and local

taxes. The Federal Government nonetheless here argues that the imposition of federal "income" taxes on an individual's state and local income tax payments poses only "unsubstantial" burdens on state and local governments. (Gov. Br. at 11). As a factual matter, the argument is patently at odds with reality.[1] But in any event, it is legally untenable.

The Government does not here contest that the federal taxes at issue discriminate against persons who pay state and local income taxes. The Government argues that the discrimination is acceptable, however, because the doctrine of intergovernmental

---

[1] Federal taxation of individuals' state and local income tax payments occurs pursuant to both the provision directly at issue here, 26 U.S.C. § 68, and the "Alternative Minimum Tax," 26 U.S.C. §§ 55, 56(b)(1)(A)(ii). The latter always imposes a 26 or 28 percent federal tax on affected individuals' state and local income tax payments. *Id.* Increasingly large numbers of taxpayers are subject to that federal imposition, with commensurate impact on the ability of state and local governments to raise revenues. See, e.g., Shailagh Murray, "Change in Minimum Tax Gets New Backers: Democrats," *The Wall Street Journal*, March 23, 2001, p. A16. In light of the growing public outcry over these unjust federal taxes, the Government's assertion that federal taxation of state and local income tax payments allegedly imposes no "substantial" burden is plainly incorrect.

tax immunity allegedly "does not apply to spare a government 'from tax burdens which are unsubstantial.'" (Gov. Br. at 11-12).

The Government there quotes *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 598, 83 L.Ed. 927 (1939), and also relies on *Helvering v. Gerhardt*, 304 U.S. 405, 419-20, 58 S.Ct. 969, 975, 82 L.Ed. 1427 (1938). But unlike the present case, the federal taxes at issue in those cases did not discriminate against persons dealing with the state government. See *Graves*, *supra*, 306 U.S. at 484, 59 S.Ct. at 600 (federal tax at issue was "a non-discriminatory tax laid on the income of all members of the community"); *Gerhardt*, *supra*, 304 U.S. at 420, 58 S.Ct. at 975 (federal tax at issue was a "nondiscriminatory tax on their [state employees'] net income, in common with that of all other members of the community").

In contrast, where one sovereign's tax does discriminate against persons dealing with the other sovereign, as here, this Court has repeatedly ruled that the discrimination is unconstitutional unless it is "directly related to, and justified by, 'significant differences between the two classes.'" *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 816, 109 S.Ct. 1500, 1508, 103 L.Ed.2d 891 (1989), quoting *Phillips Chemical Co. v. Dumas Ind. Sch. Dist.*, 361 U.S. 376, 383-85, 80 S.Ct. 474, 479-80, 4 L.Ed.2d 384 (1960).

And where, as here, such discrimination is not appropriately justified, the Court does not inquire whether or not burden from the individual instance of discrimination is "substantial." In *Davis*, for example, the burden on the Federal Government from Michigan's discriminatory taxation of retirement benefits was not alleged to be substantial, and it plainly was not. This Court nonetheless struck down the provision, because our constitutional structure cannot tolerate such discriminatory taxation of persons dealing with the other sovereign. See also, e.g., *Phillips Chemical Co.*, *supra*, (burden on Federal Government of state tax discriminating against lessees of federal lands clearly was trivial, but nonetheless held unconstitutional).

The burden on states from federal taxation of individuals' state and local income tax payments in fact is substantial. But even if it were not, the discriminatory federal taxation of individuals who pay state and local income taxes is flatly unconstitutional. The Government here concedes that such discrimination occurs on the face of the challenged statute (Gov. Br. at 2, n.2), and it does not dispute the other types of discrimination that petitioner alleges. (Cert. Petition at 22-27). There is an urgent need for this Court to intervene to halt that concededly discriminatory federal taxation.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, the Court should grant certiorari.

Respectfully submitted,

Frederick B. Campbell

555 Fifth Avenue, Suite 1700
New York, New York 10017
(212) 378-1720

Dated: January 2, 2003